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ABSTRACT

The facts of the Bakke case, points of agreement and disagreement, and implications are addressed. Although the case technically involves only the validity of denying Bakke admission to medical school in 1974, it has become a class action for the decision of large questions of constitutional law with possible enormous impact on higher education and other areas of affirmative action. Bakke alleged violation of equal protection provisions, since he was denied admission to the University of California (Davis) medical school although his test scores and grade point average were higher than most or all the 16 minority applicants who were accepted under a Task Force Program. It is suggested that there is general agreement that the case is important to higher education, that racism persists in the United States, that minorities are seriously underrepresented in higher education, that some preference must be continued if the present proportion of minorities in selective institutions is to be maintained, that the admissions process is imperfect and test scores and grade point averages are mechanical standards, and that the Davis medical school did not accept any applicants who were not qualified. The following points of disagreement are noted: whether the Constitution permits taking race or ethnic background into account in admissions decisions; whether alternatives to preferential admission, including enlarging medical schools and increasing recruitment efforts, are workable; and the impact a denial of preferential admission would have on affirmative action programs and on race relations generally. (SW)

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AN OVERVIEW OF THE BAKKE CASE AND ITS POSSIBLE IMPLICATIONS

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An Overview of the Bakke Case and Its Possible Implications

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The *Bakke* case — more formally, *Regents of the University of California (Davis) v. Allan Bakke* — is the case with everything, or at least something for everyone.

In the American constitutional law tradition, momentous issues are often triggered by a single individual who may be almost forgotten in the process. Although the case technically involves only the validity of denying Allan Bakke admission to medical school in 1974, there is no assurance that he will get a final answer in 1978. In effect, it has become a class action for the decision of large questions of constitutional law with a potential for enormous impact on higher education and even beyond into other areas of affirmative action.

The *Bakke* case is not a perfect case for the decision of those complex issues. The admissions program at the University of California Medical School at Davis was not typical of other special admissions programs; indeed, in respects to be noted it was extreme. Moreover, the facts surrounding the particular case are not as clear as one would like. Although the *Bakke* case may not be the ideal vehicle for deciding these vital questions of educational and constitutional policy, the U.S. Supreme Court has accepted the case for decision, and the decision will probably bear the burden of fixing the perimeters within which educational policy must operate.

Whatever the decision as to Allan Bakke, the ripple effect of the proceeding will be substantial. The narrow question of whether Bakke must be admitted to medical school will be overshadowed by the larger question of whether the admissions program at Davis is constitutionally valid or not. A ruling on the latter question will carry vast implications for preferential admissions programs at all medical schools, law schools and other units of higher education. The decision will almost inevitably have implications for other affirmative action programs, including employment generally.

What the Supreme Court says in *Bakke* will also be studied for relevance to its 1954 decision in *Brown v. Board of Education*, forbidding government-imposed segregation because of discriminatory intent and impact. The new question is this: Did *Brown* assure equal education opportunity through secondary school, only to have the door closed at the college and professional school level for lack of sufficient education attainment?

We must ask what the Court's answer will say of the American character. Racism, we know, persists in the United States. Can its impact be limited by private voluntary action, as was the intent of the Davis Medical School, or does that effort, however benign in purpose, unconstitutionally deprive other Americans of the equal protection of the laws? In short, is it possible to begin the process of compensating for past injustice without inflicting new injustice on persons innocent of any discriminatory practices?

Understanding of the issues in *Bakke* is impeded by the use of code words and phrases to characterize admissions programs to make them seem relatively benevolent or relatively malevolent. Consider two examples of the use of semantics to cloud the issue.

First, the admissions program at Davis Medical School has been characterized by friends as "affirmative action," which sounds benign enough, and by foes as "reverse discrimination," which sounds pretty bad. In between are the more neutral (and probably more accurate) descriptions of "minority-sensitive admissions," "special admissions" and "preferential admissions."

Second, the program at Davis is sometimes described as a "quota" system, a term carrying historic connotations of discrimination on grounds of religion, race, sex and ethnic background. The same program is described by its supporters as a system of "goals and timetables," the phrase often used in federally mandated programs of affirmative action. In fact, a number of the *amicus curiae* briefs on behalf of the University of California affirm their disapproval of quotas, but proclaim this a system of goals. What both descriptions have in common is an ingredient of numbers of minority students whose admission is sought to redress a past and continuing imbalance.

The Facts of the Bakke Case. In view of the semantic confusion that surrounds *Bakke*, it is time to state as objectively as possible the central facts of the case. Allan Bakke received a degree in mechanical engineering from the University of Minnesota in 1962. After graduate study there and service in the United States Marine Corps, he completed a master's degree in mechanical engineering at Stanford University in 1970. By 1972 he had completed the prerequisites for medical school.

In 1972 Allan Bakke applied for admission to two medical schools and was rejected by both. In 1973 he applied to, and was rejected by, 11 medical schools. In 1974 Davis turned down his second application to that school despite the fact that his prelaw school grade point average (GPA) and his Medical College Admission Test (MCAT) scores were higher than most or all the 16 minority applicants who were accepted.

The Davis Program for medical school admissions operated on two levels. In a class of 100 the general admissions program made decisions for 84 places, based on a complex formula of GPA, MCAT, interviews and even some preferences based on geography or other special factors. Although race and ethnic background were not taken into consideration, several minority students were admitted in 1974 as part of the general admissions program.

The Task Force Program, separately administered, was ostensibly a program to select 16 "disadvantaged" applicants. In practice, the places were almost invariably awarded applicants of minority race or specified ethnic background.

When Allan Bakke was denied admission to Davis in 1974, he sued in the California state courts, alleging violation of the equal protection clause of the 14th amendment to the United States Constitution, a similar provision in the California Constitution and Title VI of the Civil Rights Act of 1964, which bars discrimination on grounds of race, sex or religion in federally assisted programs.

The trial court upheld Bakke's claim on all the grounds he had urged, but conditioned his admission on proof that he would have been admitted if there had been no Task Force Program. The Supreme Court of California also held the Davis program invalid as a violation of the United States Constitu-

tion, but without reference to the state constitution or federal statute. Significantly, it shifted the burden of proof on the admission decision from Bakke to the university, ordering his admission unless the university could establish that he would *not* have been admitted if there had been no Task Force Program.

When the university conceded that it could not meet that challenge, the California Supreme Court ordered Allan Bakke admitted. That order was stayed by the Supreme Court of the United States in agreeing to review the case in a brief order in February 1977. The case was argued in October 1977. Soon thereafter the Court asked for additional briefs on the applicability of Title VI of the Civil Rights Act to the case. Following the filing of those briefs a decision is expected before the end of the present term of the Court — sometime in June 1978.

Meanwhile, the case has attracted the highest level of interest of any Supreme Court case in recent years. More than 50 briefs *amici curiae* were filed by early June 1977. Additional briefs were filed when the United States subsequently entered the case in qualified support of the university. The United States brief argued that it is permissible for a university to adopt a "minority-sensitive" program, but that the record in this case was not sufficient to establish whether the Davis program met the recommended test or transgressed the permissible. Accordingly, the brief asked the Court to remand the case to the California courts for further fact-finding.

Points of Agreement. Although differences remain sharp as to the proper outcome of the *Bakke* case, there are a number of propositions *not* at issue:

1. No one disputes the importance of the case. Higher education is generally recognized as the gatekeeper to conventional success in the United States. If ways are not found to assure minority group members access to higher education, including the professions, it will be increasingly difficult to attain the integrated society to which all aspire.

2. Racism persists in the United States. Affirmative efforts on the part of the private and the public sector are essential to the rooting out of discrimination on grounds of race or ethnic background.

3. Minorities are seriously underrepresented in higher education, when measured in terms of their proportion of the total population or even when measured against levels generally conceded to be desirable for racial and ethnic mix in this country.

4. If even the present proportion of minorities in selective institutions of higher education is to be maintained, some preference must be continued. The figures are very clear for schools of medicine, law and engineering, for example, that the percentage of minority students now in those schools (on the average 8 to 10 percent) would decline by 50 to 75 percent of present levels.

5. The admissions process is imperfect, particularly in placing principal reliance on such mechanical standards as test scores and grade point averages. Even though those factors are reasonably reliable in predicting performance, particularly in professional schools, there is no claim that they can be used to predict posteducation success in a profession or in life. However the particular case is decided, efforts should be redoubled to find new ways to test for determination, perseverance, ability to overcome obstacles (such as racial discrimination) and prospects for service in needed sectors of the economy.

6. Finally, in this roster of agreement, it is generally acknowledged that Davis did not accept any applicants, minority or majority, who were not qualified to perform the level of work required at that school at that time. Similarly, it would be a disservice to individuals and to the need for educated professionals to accept any individual not qualified to complete the prescribed course at Davis or any other institution of higher education.

Points of Disagreement. Despite the areas of agreement above identified, there remain important differences:

1. Does the Constitution permit taking race or ethnic background into account in admissions decisions? The debate on the constitutional issue is fueled by the fact that the

precedents point both ways. *Brown* and some of its progeny suggest a color-blind Constitution. But a number of cases in the same line have permitted the use of race as a factor in determining the need for busing or the drawing of school district lines. Election cases and employment cases have also taken race into account for some purposes. The reality is that a lawyer of average competence could write a rational constitutional argument either way. There is no controlling precedent on this new problem.

2. Disagreement is sharp as to the workability of alternatives to preferential admission. The California Supreme Court acknowledged *arguendo* that there is a valid social purpose served by enlarging the proportion of minority medical students, but said that result could be accomplished by enlarging the size of medical schools, increasing recruitment efforts or giving preference to the disadvantaged without regard to race. Proponents of special admissions reject each of these alternatives, arguing that classes cannot be enlarged sufficiently to bring in significent numbers of minority students; recruitment efforts are already substantial; and the "disadvantaged" criterion would principally produce more white applicants.

3. More speculative is the question as to what impact a denial of preferential admission would have on affirmative action programs and on race relations generally. Supporters of preferential admissions fear that an adverse decision would also jeopardize affirmative action programs and precipitate racial strife as minorities came to believe that opportunities for access to higher education and for advancement in employment were closed to them.

The Three Most Common Questions About Bakke. It is of course not possible to offer a definitive answer to any question until the Supreme Court speaks. But it is important to think about the future. Here are some speculations, all of which will soon be overtaken by the action of the Court.

1. *When will the case be decided?* Before the end of June 1978 (unless the Supreme Court puts it over for reargument or remands the case to the California courts for further fact-finding).

2. *What are the possible decisions?* The Supreme Court could affirm the decision of the California Supreme Court, holding the Davis plan invalid. But this could be for three quite different reasons: (a) the Court could hold that race could never be taken into account, thus invalidating the plan; (b) the Court could hold that race is a permissible factor, but the Davis plan is defective because it involves a quota; or (c) the Court could hold that race may be taken into account, but only on the explicit direction of a legislative body, state or federal. On the other hand, the Supreme Court could reverse, upholding the Davis plan (and by inference nearly all others). Taking a less strong position, the Court could hold that race can be taken into account in a goals and timetable way, reversing and remanding to the California courts for fact-finding.

3. *What next?* Whatever the decision, the important thing is for the media and the higher education community to react responsibly and carefully, not reading more into the decision than is there, and planning thoughtfully for a future to include constitutional efforts for a rational system of successful integration of higher education.

Organizations such as the Education Commission of the States, the State Higher Education Executive Officers, the American Council on Education, the Association of American Law Schools and the Association of American Medical Colleges will be confronted with an important challenge to keep the American Dream from falling apart.